

## INFORMATION PAPER

23 June 2010

SUBJECT: In-sourcing

Purpose: To provide information regarding in-sourcing, or the conversion of contracted services/functions to civilian.

### 1. Background.

***a. In-sourcing is an Administration initiative to rebuild the organic capacity of the workforce by ensuring that inherently governmental functions are performed by Government employees.***

b. The President's 4 March 2009 memorandum, subject: Government Contracting, states, "the line between inherently governmental activities that may be subject to private sector competitions has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions."

c. On 6 April 2009, Secretary of Defense announced that the Department would scale back on the role of contractors in support services. On 8 April 2009, the Office of the Secretary of Defense (Comptroller) (OSD(C)) signed Resource Management Decision (RMD) 802, which included the realignment of resources for fiscal years 2010-2015 to implement in-sourcing.

### 2. Statutory and Congressional Interest.

a. Since 2008, Title 10 US Code Section 2330a mandates in-sourcing in two areas: (1) inherently governmental functions, and (2) personal services contracts without statutory authority. The Federal Activities Inventory Reform Act defines inherently governmental functions and the FAR Subpart 7.503(c) and (d) gives examples of these functions. Personal services contracts involve direct supervision of contract employees by government personal.

b. Title 10 US Code Section 2463 requires "special consideration" for in-sourcing "closely associated with inherently governmental functions", which can cross the line and become inherently governmental depending on how the contract is performed, administered and monitored. In addition, this statute requires identification of in-sourcing candidates through a contractor inventory review process and Title 10 Section 235 requires providing more granular justifications of contracted services in the budget based on this review. The HASC and HAC-D have praised the Army's contractor inventory process and continue to focus their oversight on the use of the inventory as the basis for in-sourcing decisions. OMB views the Army's inventory process as a best business practice and used it as an example for other Agencies. The contractor inventory is currently subject to a 3 year GAO review.

c. Title 10 US Code Section 2463 prohibits arbitrary limitations on in-sourcing and the use of OMB Circular A-76 public-private competitions to in-source. Congressional architects of the in-sourcing provisions deliberately avoided making cost-savings the basis for in-sourcing based on experience from A-76 outsourcing where targets and savings caused litigation and delays of up to 3 years. Courts have given deference to agency manpower decisions but not agency cost-based decisions where the debate turns on appropriate savings assumptions. The only express statutory basis sanctioned for "special consideration" for in-sourcing as an option to reduce

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costs is when a contracting officer makes a determination of "excessive costs", pursuant to 10 United States Code section 2463.

d. In the FY2011 National Defense Authorization Bill, Rep. Langevin amendment was adopted in markup by HASC majority and that forestalled an effort from Rep. Miller and minority to stop in-sourcing. The key issue was the perceived arbitrary nature of the OSD(C) RMD 802 targets where they assumed a 40 percent savings after cutting \$4.5B from Army contracts in fiscal years 2010-2015. House Report language states that "in-sourcing should not be driven by random goals or arbitrary budget reductions." (H.Rep. 111-166, p. 291). The Langevin amendment prohibits in-sourcing targets and directs a GAO review of any claimed "savings" under RMD 802.

e. The Langevin amendment also directs use of the costing methodology outlined in the Directive-Type Memorandum (DTM) 09-007 (Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contractor Support) for the determination of costs "when costs are the sole basis for the decision" to in-source. By its terms, the DTM does not apply to the in-sourcing of inherently governmental or functions "exempted from private sector performance" by DODI 1100.22, Guidance for Determining Workforce Mix. ("Exempted from private sector performance" is defined by DODI to include closely associated with inherently governmental functions, critical functions and unauthorized personal services.) Additionally, the DTM remains controversial with contractors. In a 16 June 2010 communication to the OSD Director, CAPE (the proponent for the DTM), the Professional Services Council (PSC), a contractor lobbyist organization, criticized the DTM and expressed the need to revise it in a manner that replicates A-76 public-private competition process. PSC did "not dispute the importance of the Department Insourcing functions that are inherently governmental or exempt from private sector performance." Within the Army, the DTM cost comparison principles are implemented through the concept plan process, provided the contractor inventory review process has identified the function as "commercial" rather than inherently governmental or "exempt" (where a concept plan and DTM cost analysis is not required).

f. The impact of in-sourcing on small business is an important issue currently before Congress. Within the Army, commercial functions being performed by small business are not in-sourced. (About 11 percent of the overall 2009 contractor inventory is small business --about 30,872 contractor full time equivalents.)

### **3. Army Implementation.**

a. The Army's in-sourcing program relies on its contractor inventory review process to focus on the areas of statutory emphasis, such as inherently governmental functions. Within the Army, the contractor inventory review process is accomplished through the Panel for Documenting Contractors (PDC) process established in 10 July 2009 SecArmy policy. The PDC is led by ASA(M&RA), with OGC, ASA(AL&T) and G-3/7 membership.

(1) There is strong HASC and HAC-D support for Army contractor inventory process and PDC in H.Rep. 111-166, p.349 ("The committee recommends that the Army methodology be used by the other military departments."). Markup language requires Army methodology.

(2) The Army accounted for 264,063 contractor full time equivalents for \$43B in services in its most recent contractor inventory for FY2009.

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(3) The Army has reviewed 104,915 contractor full time equivalents in the Panel for Documenting Contractors (PDC) process and projects reviewing 120,779 in support of base-funded contract services by end of June 2010.

Inherently Governmental	Closely Associated with Inherently Governmental	Unauthorized Personal Services	Critical
1,935 FTE	47,033 FTE	1,457 FTE	3,709 FTE

(4) The PDC results are enforced through use of a Request for Services Contract Approval inherently governmental checklist certification completed at the accountable GO/SES level in all Army requiring activities, as a mandatory pre-requisite for Army contracting officer processing of any contract for service or exercise of a services contract option. (The checklist is required per the 10 July 2010 SecArmy policy and AFARS 5107.503(e).)

(5) The Army's current in-sourcing plan includes 13,323 positions from FY2010-2015, including 3,988 acquisition positions.

	FY2010	FY2011	FY2011	FY2013	FY2014	FY2015
Positions	7,162	10,921	13,157	13,260	13,288	13,323
Acquisition	1,414	2,006	2,550	3,068	3,571	3,988

Note: this information is the last official coordinated snapshot taken for purposes of external reporting. Queries of changing data bases at different points in time will produce different numbers.

(6) The Program Budget Assessment Team (PBAT) is the current HQDA forum for integrating PDC (inherently governmental or exempt) or concept plan-based (savings) in-sourcing into the program. No command has sought to undergo the burden of a concept plan-based in-sourcing since the promulgation of the DTM. No civilian authorization can be added into the program or budget process without PBAT support, even in the case of inherently governmental functions. The PBAT requires commands to provide an audit trail for an enduring funding source over the program as a requirement for obtaining a permanent civilian authorization.

(7) As of 21 June 2010, Army has filled 3,390 in-sourced positions out of 7,162 positions planned for in-sourcing in FY2010. Contributing factors are delayed funding from continuing resolution; diversion of in-sourcing funds at command levels due to overhires or continued use of contracts because of directed command hiring lag; synchronizing transition from contracts to civilian; shortages of funds because "savings" assumptions were incorrect, and identification of in-sourcing backfills is under-counted when relying solely on Requests for Personnel Actions.

b. Sometimes, it is more costly to in-source an inherently governmental function (there are no savings) but it still must be in-sourced, such as occurred with the contract security guards "arresting" people in Kwajalein Atoll (SMDC). Targets with assumed savings would undermine taking corrective action in this case. Additionally, a savings analysis is not required when the PDC identifies inherently governmental or exempt population of in-sourcing candidates.

#### 4. Way Ahead

a. The OSD (P&R) and Comptroller have acknowledged to Congressional Staff and the GAO that the Department of Defense has not fully implemented National Defense Authorization Act for Fiscal Year 2010 section 803 direction to develop our program and budget with greater granularity by projecting contractor full time equivalents based on a contractor inventory review process. Indeed, there is an expectation that HAC-D will ask tough questions about why contract expenditures have grown while we have in-sourced. An OSD Working Group led by USD(P&R), USD(ATL) and Comptroller staff will be developing implementation guidance in this area. The DepSecDef identified the failure to implement section 803 as an “impediment to in-sourcing” that must be corrected through these working groups in a 3 November 2009 memo. The consequences of this systemic problem are that it is far easier to contract for an inherently governmental function than to add civilian authorizations and hire against them, a concern addressed in the current HASC markup report language at p. 373 (“the Committee is concerned that this emphasis on authorizations is being enforced at the expense of workload-based analysis and presents challenges for the Department to efficiently manage and grow its workforce at a time when it is attempting to reduce its reliance on contractors and to right size its workforce.”): Accordingly, there is insufficient auditable information at the Departmental level to support analytically-based “savings” targets at this time.

b. The Army contractor inventory review process corrects errors in contracting inherently governmental functions. As part of this process, opportunities are identified where activities can be divested or in-sourced. There may be a longer-term potential for identifying an economic basis for potential in-sourcing as well, but only after the process has matured and the political environment has settled. Because of the sensitive nature of this activity, linking attainment of specific savings goals via in-sourcing to the specific funding of particular programs would undermine the success the Army has enjoyed with its independent Army contractor inventory review process and could create the appearance of bias. Army’s contractor inventory review and in-sourcing activities should remain a standalone oversight and management control activity within the Army.

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